In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

STEVEN LLOYD MOSLEY,

Defendant and Appellant.

Case No. S187965

Fourth Appellate District, Division Three, Case No. 05NF4105
Orange County Superior Court, Case No. G038379
The Honorable David Hoffer, Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

ISSUES PRESENTED

1. Does Jessica's Law's residency restriction (see Pen. Code, § 3003.5, subd. (b)) render discretionarily imposed sex offender registration pursuant to Penal Code section 290.006 unconstitutional under *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], in the absence of a jury trial on the facts required to support the registration order?

2. Does section 3003.5(b), validly create a misdemeanor offense subject to violation by all persons required to register for life pursuant to Penal Code section 290, et seq., regardless of their parole status?

3. If section 3003.5(b) is not separately enforceable as a misdemeanor offense, does that section nevertheless operate to establish the residency restrictions contained therein as a valid condition of sex offender registration pursuant to section 290, et seq.?

SUMMARY OF ARGUMENT

Neither the sex offender registration requirement nor the residency restriction are subject to *Apprendi*. They represent only accoutrements of the sentence, not traditionally within the jury's purview, rather than increases in the sentence. It would undercut the purpose of sex offender registration, community notification, and risk assessment if the residency restriction were deemed to transform sex offender registration from a regulatory duty into a criminal penalty.

The residency restriction, further, applies only to parolees who are registered sex offenders, and is enforceable only by parole revocation. This interpretation is essential in harmonizing section 3003.5(b) with pre-existing laws regulating registered sex offenders. It is also essential to effectuate Proposition 83's purpose of protecting the community by letting law enforcement and the public know the whereabouts of convicted sex offenders.

ARGUMENT

I. NEITHER THE REGISTRATION REQUIREMENT NOR THE RESIDENCY RESTRICTION GIVE RISE TO A RIGHT TO A JURY TRIAL ON THE FACTUAL FINDINGS THAT TRIGGER THE DEFENDANT'S OBLIGATION TO REGISTER

A. Registration and the Residency Restriction Are Not Governed by *Apprendi*

Appellant argues that *Blakely v. Washington* (2004) 542 U.S. 296, 304-305 [124 S.Ct. 2531, 159 L.Ed.2d 403] and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.C.t. 856] support his contention that *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] requires a jury trial on the factual predicate that permits discretionary imposition of an obligation to register as a sex offender. *Blakely* and *Cunningham,* however, require jury trials only on facts that, when proved, actually result in increasing the defendant's sentence. Those precedents do not require jury trials on facts that trigger registration or the residency restriction, for neither increases the length of the defendant's incarceration.

An order to register as a sex offender, and possible future enforcement of the residency restriction, amount at most only to collateral consequences of a defendant's conviction. (See *People v. Picklesimer* (2010) 48 Cal.3d 330, at pp. 337-338 [registration is a collateral consequence of conviction].)[1] Registration is a regulatory measure designed to facilitate

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[1] A trial court is obligated to advise a defendant of the direct consequences of a guilty plea; it is not obligated to advise of collateral consequences. (*People v. Bunnell* (1975) 13 Cal.3d 592, 605.) Dicta in *Bunnell* stating that sex offender registration was an example of a direct consequence of a plea was superseded by both *Collins v. Youngblood* (1990) 497 U.S. 37 [110 S.Ct. 2715, 111 L.Ed.2d 30], and this Court's later opinion in *People v. Castellanos* (1999) 21 Cal.4th 785. *Collins* held that a law violates the ex post facto clause only when it punishes as a crime an act previously committed that was innocent when done; or makes more

(continued...)

community protection. As this Court has repeatedly recognized, it does not constitute punishment for the defendant's crime. (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1197, citing *In re Alva* (2004) 33 Cal.4th 254, 268; *People v. Castellanos* (1999) 21 Cal.4th 785, 796; see also *Hatton v. Bonner* (9th Cir. 2004) 356 F.3d 955.)

Nor does the residency restriction transform an order to register from a regulatory duty into punishment. As this Court held in *In re E.J.* (2010) 47 Cal.4th 1258, the residency restriction is not triggered simply by the duty to register as a sex offender, and application of the residency restriction during parole does not constitute punishment for the registrable sex offense. This Court said:

(...continued)
burdensome the punishment for crime after its commission; or deprives one charged with crime of any defense available under law in effect when the act was committed. *Castellanos* held that sex offender registration is not punitive, but a regulatory duty enacted to protect public safety. The majority of courts today hold that sex offender registration is a collateral, not a direct, consequence of a conviction, so that a sentencing court need not advise a defendant of a registration obligation before accepting a guilty plea. (See, e.g., *Roe v. Farwell* (D. Ct. Mass. 1998) 999 F.Supp. 174, 183; *Collie v. State* (Fla. App. 1998) 710 So.2d 1000, 1008; *State v. Torres* (Sup. Ct. Neb. 1998) 574 N.W.2d 153, 155; *State v. Munds* (Wash. App. Ct. 1996) 922 P.2d 215, 217, fn. 2; *In the matter of B.G.M.* (Tex. App. 1996) 929 S.W.2d 604, 606-607; *People v. J.G.* (Sup.Ct. N.Y.1996) 655 N.Y.S.2d 783, 784; *Johnson v. State* (Wyo.1996) 922 P.2d 1384, 1387; *People v. Starnes* (Ill. App.1995) 653 N.E.2d 4, 6; *Doe v. Poritz* (Sup.Ct. N.J. 1995) 662 A.2d 367, 397; *State v. Ward* (Wash. 1994) 869 P.2d 1062, 1075; *State v. Young* (Ariz. 1975) 542 P.2d 20, 22; cf. *People v. Zaidi* (2007) 147 Cal.App.4th 1470, 1482; and see annotations at 41 A.L.R. 6th 141.) Nonetheless, it behooves counsel to advise a defendant when registration may be a collateral consequence of a plea. (See *People v. Resendiz* (2001) 25 Cal.4th 230: this Court suggested that it was immaterial whether the failure to advise of immigration consequences was a collateral consequence of the plea, because it was ineffective assistance of counsel to fail to so advise.)

> For purposes of retroactivity analysis, the pivotal "last act or event" [citation] that must occur before the mandatory residency restrictions come into play is the registered sex offender's securing of a residence upon his release from custody on parole. If that "last act or event" occurred subsequent to the effective date of section 3003.5(b), a conclusion that it was a violation of the registrant's parole does not constitute a "retroactive" application of the statute.

(*Id.* at p.1274.) This Court explained that the residency restriction is not an ex post facto law if applied to such conduct occurring after its effective date "because it does not additionally punish for the sex offense conviction or convictions that originally gave rise to the parolee's status as a lifetime registrant under section 290." (*In re E.J., supra*, 47 Cal.4th at p. 1280.)

Here, Mosley was convicted for a sexually-motivated offense committed in 2003, and he was placed on *probation* after his conviction on January 29, 2007. Under *E.J.*, the residency restriction is not punishment if the person subjected to it was placed on *parole* after the effective date of its enactment on November 7, 2006.

Appellant argues that the registration requirement amounted to increased punishment under *Apprendi* as to him because he became subject to it when he was placed on *probation*. Respondent agrees that neither *E.J.* nor *Picklesimer* expressly reached the issue of whether the residency restriction is punitive as to someone like appellant, who committed his crime prior to enactment of Jessica's Law and was placed on probation after enactment of the residency restriction. As explained below, however, a probationer is not subject to the residency restriction; that restriction would arise only if appellant later were paroled from prison on his 2003 sex offense or on a future offense. (See pp. 11-12, 20, *post.*) So appellant's argument is misplaced.

Even if the residency restriction ultimately was deemed applicable to registered sex offenders on probation as well as those on parole, appellant

still would not be entitled to a jury trial prior to imposition of a duty to register. In support of his argument that the residency restriction was intended to be punitive, appellant argues that one stated intent of Proposition 83 was to punish, and therefore the residency restriction (only one of many parts of Proposition 83) was intended to be punitive. This argument is not persuasive, since Proposition 83 also amended the actual statutory penalties attached to certain sex offenses and those particular changes were ipso facto punishment.

Appellant also argues that there is no rational connection between the residency restriction and a non-punitive purpose because the restriction limits only where offenders can live, and not where they can be. Terms and conditions of parole for sex offenders, however, indeed may place limits on where parolees can be. For example, a standard term and condition of parole for a child molester is to stay away from places where children congregate. Additionally, specified sex offender parolees (but not sex offenders on probation) are prohibited today from being in a public park without express permission from their parole officer. (Pen. Code, § 3053.8.) The residency restriction is consistent with other non-punitive laws governing parolee sex offenders.

In any event, *Oregon v. Ice* (2010) 555 U.S. 160 [129 S.Ct. 711, 172 L.Ed.2d 517] is dispositive on the issue of whether the duty to register and the residency restriction trigger the jury trial right recognized in *Apprendi.* Under *Ice*, both are "accoutrements"—not part of the sentence itself. (*Ice*, at pp.171-172.) Traditionally, collateral consequences of sentences such as sex offender registration—like the choice of consecutive terms at issue in *Ice*—were never entrusted to a jury under the "common-law tradition" in which the *Apprendi* right is rooted. (*Ice,* 555 U.S. at p. 170.) Here, then, the trial judge could properly make the factual determination authorizing

the order that appellant should register, because "no erosion of the jury's traditional role was at stake." (*Ibid.*)

B. Even If Enforcement of the Residency Restriction Required Jury Findings on the Facts Underlying the Registration Duty, the Registration in This Case Would Remain Valid

As respondent has argued, the registration requirement in this case remains valid no matter what. Perhaps seeing the potential for avoiding both, appellant argues that the registration requirement cannot be severed from the residency restriction. But registration has no connection with the later-enacted residency restriction. The residency restriction was not placed in the Sex Offender Registration Act (SORA) (Pen.Code, §§ 290-290.023), but in the section of the Penal Code governing parole supervision. Indeed, rather than aiding the goal of sex offender registration, the residency restriction impedes it. (See Argument II, *post.*) The trial court's discretionary finding that sex offender registration should be imposed in this case is valid and severable from the issue of whether the residency restriction is punitive.

Even if there were *Apprendi* error in this case, moreover, it would be subject to harmless error analysis. The harmless error standard is whether a reasonable jury—not necessarily this jury—would have found that appellant's offense was sexually motivated or a result of sexual compulsion, the factual predicate for ordering sex offender registration under section 290.006. (See *Chapman v. California* (1967) 386 U.S.18, 24 [87 S.Ct.824, 17 L.Ed.2d 705].) Here, as argued in the opening brief, any *Apprendi* error proves harmless because the offense was, beyond a reasonable doubt, sexually motivated. (*United States v. Garcia-Guizar* (9th Cir. 2000) 234 F.3d 483, 489; *People v. Cleveland* (2001) 87 Cal.4th 263, 271 [*Apprendi* error subject to *Chapman's* harmless beyond a reasonable doubt standard.)

Appellant argues that, because his jury found him guilty of assault rather than of having committed a lewd or lascivious act with a child under 14, it would necessarily have also found the crime was not sexually motivated. But the trial court's summary of the facts found, "beyond a reasonable doubt," that Mosley had "sexually assaulted the victim" and that "the assault in this case was committed as a result of sexual compulsion or for purposes of sexual gratification." (Court of Appeal, Second Slip Opn. at p.7.) When the trial court imposed the duty to register, it noted that there was no way to know why the jury had acquitted on the greater charge, and that it was "certainly not obvious that the jury disbelieved the witnesses." (2 RT 437.) The victim testified that a rape had occurred, and there was corroborating witness testimony. The court imposed registration because it found appellant was "physically dangerous to the public" and because his conduct "demonstrates that he was driven by sexual compulsion over which he had little control, creating a serious and well-founded risk that the defendant will reoffend." (2 RT 441.) Finally, the court observed that appellant was released to the community, was not even on probation, and as an untreated offender "presents an especially serious risk to the community." (2 RT at 442.)

Similarly, the Court of Appeal found that the facts supported the trial court's order that appellant register. Beyond a reasonable doubt, a jury would have found that the assault in fact had been sexually motivated. Any error under *Apprendi* must therefore be harmless under *Chapman*.

II. THE RESIDENCY RESTRICTION APPLIES ONLY TO PAROLEES

Respondent noted in its opening brief that the scope of section 3003.5(b) is ambiguous. To resolve its ambiguity correctly, it should be harmonized with the pre-existing comprehensive and detailed statutory

scheme governing management of registered sex offenders.[2] One express intent of the initiative was to enhance the ability to keep track of released sex offenders. Another was to improve community safety. To comport with the community safety intent of both the initiative itself and pre-existing laws, the residency restriction should be construed as limited to parolee sex offenders.[3]

The meaning of the initiative cannot be determined from a single word or sentence, but must be construed in context; and provisions relating to the same subject matter should be harmonized to the extent possible. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) It should be assumed that voters did not intend to undermine the public safety purpose of the existing scheme of sex offender registration, notification, individualized risk assessment, and individualized supervision. Sex offender management laws were intended to aid in crime solving and deterring sexual recidivism. As explained below, applying the residency restriction outside the parole violation context would interfere with both goals.

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[2] The standard for construing an initiative permits considering extrinsic evidence when the language of an initiative is ambiguous. (*Prof'l Engineers in California Gov't v. Kempton* (2007) 40 Cal.4th 1016, 1037.) A statutory initiative is subject to the same state and federal constitutional limitations as are the Legislature and the statutes which it enacts. (*Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 674, citing *Hays v. Wood* (1979) 25 Cal.3d 772, 786, fn. 3.)

[3] Ironically, even when applied as a blanket restriction only to parolee sex offenders, the law has not been effective: a recent Report of the CDCR Sex Offender Supervision and GPS Monitoring Task Force (Oct., 2010), available at www.cdcr.ca.gov (Sex Offender and GPS Task Force report) states: "Blanket residence restrictions have not improved public safety and have compromised the effective monitoring and supervision of sex offender parolees." (CDCR Report at p. 17.)

A. Applying the Residency Restriction to Probationers Would Interfere with Tailoring Terms and Conditions of Probation for Individual Offenders

The residency restriction interferes with the goal of individually tailoring supervision terms to the offender, including determining the most appropriate housing for each offender. Rather than imposing a blanket restriction, probation departments historically have developed the expertise for determining terms and conditions to be applied to each individual sex offender under their supervision, including appropriate housing. Individualized determinations of where to house a sex offender will better protect the public.

Prior to enactment of the residency restriction, parole and probation authorities had considerable latitude to tailor terms and conditions of supervision, including housing. This Court decided in *People v. Lent* (1975) 15 Cal.3d 481 that parole conditions would be upheld unless the condition (1) had no relationship to the crime of which the offender was convicted, (2) related to conduct which was not in itself criminal, or (3) required or forbade conduct which was not reasonably related to future criminality. (*Id.* at p. 486; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120 [same standard applies to probation conditions].) Even conditions that otherwise would impinge on constitutional rights can be upheld if carefully tailored and "reasonably related to the compelling state interest in reformation and rehabilitation...." (*People v. Mason* (1971) 5 Cal.3d 759, 768.)

Sentencing courts also had broad discretion, prior to the initiative, to impose reasonable parole and probation conditions to foster rehabilitation and protect the public—including restrictions on housing placement. (Pen. Code, § 1203.1; *People v. Olguin* (2008) 45 Cal.4th 375, 379, quoting *Carbajal, supra*, 10 Cal.4th at p. 1120.) Housing is an essential component

of re-entry for an offender on supervision, and can drastically affect the chance that rehabilitation will occur. The power to determine suitable housing options was largely reserved to the supervising authority and to the courts prior to enactment of Proposition 83.[4]

The principal statutory constraints on parole and probation supervision of registered sex offenders, prior to enactment of Proposition 83, were related to the individual risk level of such offenders under supervision.[5] Probation and parole were required to supervise high risk sex offenders on intensive and specialized probation and parole caseloads. (Pen. Code, §§ 1203f, 3008.)

It was well established prior to 2006 that appropriate and adequate housing for released offenders on supervision is crucial to rehabilitation and reduction of recidivism rates. "Almost every one of the scholarly papers published recently about sex offender residence restrictions emphasizes this very point. The general criminology research is unanimous in associating criminal recidivism with an unstable lifestyle that includes housing instability or homelessness along with accompanying unemployment. The

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[4] The exceptions affected only a group of offenders who had molested children under age 14 (Pen. Code, § 3003(g)), and registered sex offenders who sought to live together during supervision. (Pen. Code, § 3003.5(a).) Section 3003(g) restricted offenders convicted of specified child molestation offenses from living within 1/4 mile of a school, and prohibited high risk sex offender parolees from living within 1/2 mile of a school. (Pen. Code, § 3003, subd. (g), Stats. 2005, c. 463 (A.B. 113), § 1.) This provision today, as amended, restricts only specified parolees convicted of child molestation from living within 1/2 mile of a school. The residency restriction effectively expanded this earlier residency provision, formerly limited to serious child molesters and high risk parolees, to all parolees. The Jessica's Law residency restriction reduced the distance such an offender could live from 1/2 mile to 2000 feet from a school, and prohibited residences within 2000 feet of parks where children congregate.

[5] See fn. 11, *supra*.

combination represents a major risk factor for re-offending." (*Reconsidering California's Sex Offender Residence Restriction Policies* (Aug. 2011), at www.casomb.org/reports, at p. 14.)

An initiative "is not applicable where 'the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential.' [Citations.]" (*Simpson v. Hite* (1950) 36 Cal.2d 125, 134.) Here, it would negatively impact efforts to rehabilitate registered sex offenders and to reduce recidivism if the residency restriction removed the power of the courts and probation departments to determine suitable housing options in individual cases. The inevitable effect of the residency restriction, which to date has mainly been applied to parolees, has been to remove the parole authority's ability to place sex offenders in appropriate housing, and has negatively affected parole's ability to individualize supervision of those offenders. It has "compromised the effective monitoring and supervision of sex offender parolees." (See fn. 3, *ante*.) Construing the residency restriction to apply only to parolees would permit *probation* to make individualized determinations regarding appropriate housing.

Another reason to conclude that section 3003.5 is limited to parolees is that sex offenders sentenced to prison terms are more likely to be high risk offenders than those placed on probation.[6] The Jessica's Law

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[6] In 2010, the California Department of Justice reported to the SARATSO Committee that 13.17% of the sex offender parolees scored on the Static-99 in 2010 had high risk scores (i.e., scored 6 or above on the Static-99), while 8.6% of a mixed group of sex offenders who were scored presentencing (some later sentenced to probation and some to prison) were high risk when scored in 2010 prior to sentencing by probation). It is likely that the percentage of sex offenders who were high risk when scored pre-sentencing was even lower as to the group which received only probationary terms, but this statistic is not available.

residency restriction could logically have been based on the fact that sex offenders on parole are at higher risk for reoffense, as a group, than either registrants on probation or those who have completed supervision. Similarly, a sex offender whose sex crime resulted in a probation sentence, but who later reoffends (even nonsexually) by committing another offense that results in either probation revocation or a separate prison sentence, is also at higher risk for reoffending sexually.[7] Conversely, probation offenders who do not reoffend are likely to be lower risk. "Probation is generally reserved for convicted criminals whose conditional release into society poses minimal risk to public safety and promotes rehabilitation. [Citation.]" (*People v. Olguin, supra*, 45 Cal.4th at p. 379.)

Registrants who are no longer on supervision are even more likely to be low risk offenders than those on probation. Sex offenders released to the community for more than 10 years without committing a new serious or violent offense (of any kind) are not eligible to be scored on the Static-99—because the offender is likely to be so low risk that the score would not be statistically significant.[8] But registered sex offenders who are returned to prison and later released on parole, even on a non-sex offense, can be re-scored on the Static-99 because risk of reoffense can be calculated on an

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[7] One predictor of sexual reoffense is criminal history, including prior criminal offenses (even when the prior offenses are nonsexual). (Mann, Hanson & Thornton, *Assessing Risk for Sexual Recidivism: Some Proposals on the Nature of Psychologically Meaningful Risk Factors*, Sexual Abuse: A Journal of Research and Treatment (2010) <http://www.sagepublications.com> ["[R]ule violations, noncompliance with supervision, and violation of conditional release, were consistently large predictors of sexual recidivism..."]; Hanson, et al., *Sex Offender Recidivism Risk: What We Know and What We Need to Know* (2003) Ann. N.Y. Acad. Sci. 989: 154, 157.)

[8] See Static-99 Coding Rules, SARATSO Committee web site at <www.cdcr.ca.gov/Parole/SARATSO_Committee/SARATSO.html>.

offender who did not remain offense-free in the community. Sex offenders on parole after a later re-imprisonment unrelated to the original sex offense are at higher risk for sexual reoffense.

Prior to enactment of the Jessica's Law residency restriction there were no laws in California restricting where registered sex offenders could live once they were discharged from parole or after successful completion of probation.[9] If the residency restriction were construed to apply to all registered sex offenders for life, the goal of the pre-existing statutory scheme to tailor restrictions such as housing to higher risk sex offenders on supervision, particularly high risk child molesters, would be upended. Worse, the goal of reducing sexual recidivism would be thwarted.

B. The Residency Restriction, If Construed to Apply to Non-Parolees, Would Interfere with the Goal of Registration

The goal of sex offender registration is to permit local law enforcement to monitor the whereabouts of designated sex offenders. The residency restriction, if applied outside the parole context, would interfere with this goal because it would increase transient registration, creating a much larger group of offenders unavailable for surveillance in sex crime investigations.

The aim of registration laws was to track registrants at registered addresses. (The first registration law was enacted in 1947, and was recodified in 2007 as the SORA by Stats. 2007, c. 579 (S.B. 172), § 8, eff.

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[9] There were laws in existence prior to Proposition 83 regulating where registered sex offenders could be, however. (E.g., registrants cannot be on a school campus without lawful business and permission of chief administrative official of school (Pen. Code, § 626.81); sex offenders who loiter about a school or public place at or which children attend or normally congregate, after being asked to leave, are subject to a misdemeanor penalty (Pen. Code, § 653(b).).

Oct. 13, 2007, Pen. Code, §§ 290-290.023). The stated intent of Proposition 83 was to "provide Law Enforcement with the tools they need to keep track of [registered sex offenders]. How can we protect our children if we don't even know where the sex offenders are?" (Voter Information Pamp., Gen. Elec. (Nov. 7, 2006) Analysis by the Legislative Analyst of Prop. 83, at p.46.)

But the residency restriction prevents law enforcement from knowing where sex offenders are, for it fosters increased transiency of registered sex offenders. An interpretation of the residency restriction that results in large increases in the population of transient sex offenders therefore would undercut the real intent of the voters, which was to make communities safer from sexual offenders. Criminological research established, long before the enactment of the residency restriction in 2006, that transience increases the risk of recidivism and, conversely, that stability in residence and employment decreases recidivism.[10] "Numerous studies show that a

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[10] See, e.g., letter from U.S. Attorney General Eric Holder to state governors and Attorneys General, April 18, 2011:

> Collateral consequence statutes and policies impose additional burdens on people who have served their sentences, including denial of employment and housing opportunities, without increasing public safety in essential ways. However, [...] research reveals that gainful employment and stable housing are key factors that enable people with criminal convictions to avoid future arrests and incarceration. I encourage you to evaluate the collateral consequences in your state - and to determine whether those that impose burdens on individuals convicted of crimes without increasing public safety should be eliminated.

parolee who finds and maintains a steady job – and who also has stable housing and avoids substance abuse – is less likely to re-offend."[11]

The initiative's goal of keeping track of registrants was consistent with the purpose of registration. The SORA requires registrants to register at every residence where they reside. If they have no residence address, they must register as transient. (Pen.Code, §§ 290.010, 290.011.) Transiency[12] hinders the ability of law enforcement to find a registrant when necessary in an investigation, because the transient registrant's actual location is unknown and such an offender cannot be readily located. "The purpose of section 290 is to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future. [Citation.]" (*Wright v. Superior Court* (1997) 15 Cal.4th 521, 527.)

Further, a transient has no address that can be disclosed to the public. The home addresses of specified offenders are posted on the Megan's Law web site (Pen. Code, § 290.46(b); see *People v. Presley* (2007) 156 Cal.App.4th 1027, 1034), but a person who registers as transient has no residence address which can be posted, and consequently will appear on the web site only by ZIP code. Neither the public nor a registering agency knows where a transient sex offender is either sleeping or staying during the day.

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[11] Governor's Rehabilitation Strike Team, *Meeting the Challenges of Rehabilitation in California's Prison and Parole System* (2007), <www.cdcr.ca.gov/GovRehabilitationStrikeTeamRpt_012308.pdf>; see also Homelessness Among California's Registered Sex Offenders: An Update, report of the California Sex Offender Management Board (Aug. 2011), <www.casomb.org/reports>, at pp. 9-13.)

[12] Registrants who do not have a residence address (i.e., who are homeless) must register every 30 days. (Pen.Code, § 290.011.)

Community safety is better served when law enforcement knows where to locate a registered sex offender (*People v. Poslof* (2005) 126 Cal.App.4th 92, 97) and when the public knows where registrants are living. Such knowledge is not possible when sex offenders are transient.

C. Broad Application of the Residency Restriction Would Interfere with the Community Notification Goal of Megan's Law

The residency restriction is not consistent with the pre-existing statutory scheme of Megan's Law, and the fact that it interferes with community knowledge about sex offenders' whereabouts supports construing it to apply only to parolee sex offenders. It interferes with community notification because it hinders public knowledge of the whereabouts of transient sex offenders. These offenders can be located only by registration in a particular ZIP Code—not by a residence address.

Megan's Law authorized community notification about sex offenders in California. (Stats.1996, c. 908 (A.B. 1562) § 3, eff. Sept.25, 1996, Pen.Code, §§ 290.45-290.46.) It authorized local law enforcement and the California Department of Justice to inform the public of the whereabouts of registered sex offenders. Megan's Law permits the public to view online the residence addresses of sex offenders convicted of offenses deemed serious enough by the Legislature to require public disclosure. (Pen.Code, § 290.46, subd.(b).) Law enforcement may, in its discretion, notify the public about an offender deemed to be posing a risk. (Pen. Code, § 290.45(a).)

Until the enactment of Megan's Law in California in 1996, the fact that someone was a registered sex offender was known only to law enforcement. The express intent of the enactment of community notification was to protect community safety by disclosing to the public the

whereabouts of registrants whose offenses were deemed serious enough to warrant disclosure. In enacting Megan's Law, the Legislature found:

> (b) It is a compelling and necessary public interest that the public have information concerning persons convicted of offenses involving unlawful sexual behavior collected pursuant to sections 290 and 290.4 of the Penal Code to allow members of the public to adequately protect themselves and their children from these persons. [¶]...[¶]
>
> (d) In balancing the offenders' due process and other rights against the interests of public security, the Legislature finds that releasing information about sex offenders under the circumstances specified in this act will further the primary government interest of protecting vulnerable populations from potential harm.
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> (e) The registration of sex offenders, the public release of specified information about certain sex offenders pursuant to sections 290 and 290.4 of the Penal Code, and public notice of the presence of certain high-risk sexual offenders in communities will further the governmental interests of public safety and public scrutiny of the criminal and mental health systems that deal with these offenders.
>
> (f) To protect the safety and general welfare of the people of this state, it is necessary to provide for continued registration of sex offenders, for the public release of specified information regarding certain more serious sex offenders, and for community notification regarding high-risk sex offenders who are about to be released from custody or who already reside in communities in this state. This policy of authorizing the release of necessary and relevant information about serious and high-risk sex offenders to members of the general public is a means of assuring public protection and shall not be construed as punitive.
>
> (g) The Legislature also declares, however, that in making information available about certain sex offenders to the public, it does not intend that the information be used to inflict retribution or additional punishment on any such person convicted of a sexual offense. While the Legislature is aware of the possibility of misuse, it finds that the dangers to the public of nondisclosure far outweigh the risk of possible misuse of the information....

(Uncodified preamble to Megan's Law, Stats.1997, c.908.)

The residency restriction has made it impossible to keep track of many paroled sex offenders who are now transient, or to notify the public of their location. Construing section 3003.5(b) to apply to registrants on probation, or no longer on supervision, would further interfere with the goal of Megan's Law.

D. Broad Application of the Residency Restriction Would Interfere with the Goals of California's Individual Risk Assessment Scheme

California has a system for assessing individual risk of reoffense of each sex offender. The goal of linking individual risk of reoffense to management of sex offenders on supervision would not be served by applying the residency restriction to all such offenders.

Prior to enactment of the residency restriction, California established a system of individual risk assessment based on empirical research about sex offender recidivism. (Sex Offender Punishment, Control and Containment Act of 2006, Stats.2006, c.337 (S.B. 1128) eff. Sept. 20, 2006 (Pen.Code, §§ 290.03-09).) In enacting this law, the Legislature found: "[t]hat a comprehensive system of risk assessment, supervision, monitoring, and containment for registered sex offenders residing in California communities is necessary to enhance public safety and reduce the risk of recidivism posed by these offenders." (Pen. Code, § 290.03.) In this Act, the Legislature reiterated the findings and declarations made in the preamble to Megan's Law. (Pen.Code, § 290.03.)

Individual risk assessment requires evaluation of the risk of sexual recidivsm of each individual offender and identifies higher risk offenders. Risk assessments are conducted prior to the sentencing of a sex offender

whose offense requires registration. (Pen.Code, § 1203.067.)[13] The risk assessment scheme also requires parole and probation to assess all registered sex offenders on their caseloads, using an empirically valid tool approved by the state sex offender risk assessment committee. (Pen.Code, § 290.04-290.06.)

Knowing the offender's risk of reoffense allows probation and parole to tailor conditions of supervision to the offender, to better protect the community. The Static-99 was the static risk assessment tool initially selected by the Legislature in September 2006. (Pen.Code, § 290.04.)[14]

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[13] While the law requiring individual pre-sentencing risk assessment was in effect prior to enactment of Proposition 83, it was phased in to allow time for probation to learn how to score the risk tool, and scoring on the tool was not mandated to begin until July 2008. (Pen.Code, § 290.06, subd. (a)(6), Stats. 2006, c. 337 (S.B. 1128) § 15; statute later amended to eliminate the start date of pre-sentencing risk assessment.)

[14] Selection of this risk tool was later affirmed by the state risk assessment committee (SARATSO Committee). (See Pen.Code, § 290.04(b).) The announcement of the selection of the Static-99 as the state's static risk tool is posted at <www.cdcr.ca.gov/Parole/SARATSO_Committee/SARATSO.html>. According to the report of the Senate Appropriations Committee:

> STATIC-99 is a widely accepted diagnostic tool to assess the recidivism risk of adult males convicted of sex crimes. Developed in Canada, STATIC-99 is used throughout North America and around the world and is a component of the Department of Mental Health (DMH) review of persons who face possible commitment as sexually violent predators (SVPs). STATIC-99 is also used by CDCR in determining which high-risk parolees should be monitored by GPS.
>
> [¶] SB 1128 would require all registered adult male sex offenders to be assessed for risk of re-offense using STATIC-99 beginning January 1, 2007. Training for probation department staff in conducting STATIC-99 assessments, though, would be provided by CDCR beginning in 2008.

(continued...)

Parole began using the Static-99 earlier in 2006 to individually assess parolee sex offenders' risk levels, pursuant to internal policy based on best practices in parole supervision recommended by the Governor's High Risk Sex Offender Task Force. (Report of the California High Risk Sex Offender Task Force, Aug. 15, 2006, at <http://www.casomb.org/reports.htm>; see Sen. Approps. Committee, Rep. on Sen. Bill 1128 (2005-2006 Reg. Sess.) Apr. 18, 2006, at pp. 4-5.)

Beginning in 2012, risk assessment was expanded to include dynamic risk assessment (based on changing, rather than static, risk factors) and violence risk assessment. (Pen.Code, § 290.09.) Probation and parole will have a much broader picture of the overall risk posed by individual sex offenders. Probation should be able to use this information to support decisions regarding supervision of sex offenders on probation, including housing options.

It would also be consistent with later-enacted law if the residency restriction were held to apply only during parole. In 2010, use of the "Containment Model" was mandated in California. (Pen.Code, §§ 290.09, 1203.067, 3008, 9003 [Chelsea's Law] Stats. 2010, c. 291 (A.B. 1844) § 13, eff. Sept. 9, 2010.) The Containment Model requires registered sex offenders to participate in sex offender-specific treatment programs during supervision. Treatment providers must communicate closely with supervising officers and polygraph examiners, using a victim-centered approach. The provisions of Chelsea's Law apply only to sex offender registrants on supervision—not to registrants who have successfully completed parole or probation.

(...continued)
(Sen. Approps. Committee, Rep. on Sen. Bill 1128 (2005-2006 Reg. Sess.) Apr. 18, 2006, at p. 4.)

The goals of rehabilitation and public safety are better served by providing fuller opportunities for offenders who are not on parole supervision to obtain employment and to reside near transportation and services. Once such an offender reoffends, however, and is placed on parole for any offense, the offender would become subject to the residency restriction. As discussed above, sex offenders on parole are higher risk, as a group, than those on probation or no longer on supervision.

Residency restrictions interfere with effective tracking, monitoring, and close supervision of sex offenders on parole or probation, and are unrelated to where reoffending occurs.[15] To avoid these harms, section 3003.5 must be construed narrowly. The pre-existing statutory scheme allowed housing to be determined on a case-by-case basis by the courts and supervising authority, and met state goals of rehabilitation and reduced risk of sexual recidivism. The residency restriction would better serve these goals if limited to parolees. (*People v. Arias* (2008) 45 Cal.4th 169, 177 ["Statutes should be examined in context and harmonized internally and

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[15] Residing close to a school is not related to where sexual reoffense occurs. (Nieto & Jung, *The Impact of Residency Restrictions on Sex Offenders and Correctional Management Practices: A Literature Review* (Aug. 2006), California Research Bureau, <www.library.ca.gov/crb/06/08/06-008.pdf>; Colorado Department of Public Safety, Sex Offender Management Board, *Report on Safety Issues Raised by Living Arrangements for and Location of Sex Offenders in the Community*, (Mar. 15, 2004), <www.dcj.state.co.us/ors/pdf/docs/FullSLAFinal.pdf>; Minnesota Department of Corrections, *Residency Proximity and Sex Offender Recidivism in Minnesota* (Apr. 2007), <http://www.doc.state.mn.us/publications/publications.htm#so>; Levenson, J., et al., *Residential Proximity to Schools and Daycare Centers: Influence on Sex Offender Recidivism, an Empirical Analysis* (Dec. 2008) <http://www.commerce.wa.gov/search.htm?qt=Residential+Proximity&x=9&y=2>; and see CASOMB January 2010 report to the Legislature, <www.CASOMB.org/Reports>.

with related statutes."]; *Lungren v. Deukmejian, supra,* 45 Cal.3d at p. 735 ["The intent prevails over the letter, and the letter will, if possible, be read as to conform the spirit of the act."].)

Such a construction would be consistent with the requirement, also imposed by Jessica's Law, that all sex offender parolees must wear a GPS (Pen. Code, § 3004). This provision, restricted to offenders released from prison sentences, did not expand the already-existing requirement that high risk sex offenders on probation were required to be monitored by GPS. (Pen.Code, § 1202.8, enacted in S.B. 1178 (2205-2006 Reg. Sess.) eff. Sept. 20, 2006 [GPS monitoring is still mandated only for high risk sex offenders on probation "unless the court determines that such monitoring is unnecessary for a particular person."].) The fact that the initiative treated paroled sex offenders differently than those granted probation for purposes of wearing a GPS demonstrates recognition that paroled offenders are, as a group, higher risk than those who have never been to prison.

III. FAILURE TO COMPLY WITH SECTION 3003.5(b) IS A PAROLE VIOLATION BUT NOT A CRIME

The residency restriction did not create a new crime, and is enforceable only as a parole violation. Unlike the residency restriction, there are statutory penalties for violating the registration laws. No such penalty was specified for violation of section 3003.5.

The residency restriction is not a part of the SORA, nor is it helpful to the purpose of that act. In fact, the residency restriction undermines the purposes of the SORA because it inevitably increases the transient sex offender population. Since the residency restriction is not part of the sex offender registration scheme, nor necessary to its operation, penalties for failure to register are not sanctions for violating section 3003.5.

The placement of the residency restriction in the parole section of the Penal Code supports respondent's argument that section 3005(b) is not

enforceable as a penal provision but only as a violation of parole.[16] If it had been intended to be enforceable as an incident of sex offender registration, it would have been placed in the SORA.

Although arguing that the residency restriction describes a criminal offense, appellant cannot explain why all other laws governing registered sex offenders specifically impose misdemeanor or felony penalties for violations but the residency restriction simply declares failure to reside in compliant areas is unlawful. His argument that a statute which merely declares an act unlawful should be construed as creating a misdemeanor is unsupported by the one example he proffers. Health and Safety Code section 11364, cited by appellant, provides that possession of instruments for injecting or smoking controlled substances is unlawful, and has been construed as a misdemeanor. But appellant overlooks the fact that this is true because Health and Safety Code section 11372.5 states that section 11364 is a crime and designates applicable fines.[17]

Although the Voter Guide to Proposition 83 states that the Legislative Analyst believed the language of section 3003.5(b) created a misdemeanor, that opinion is not binding on this Court. It is inexplicable why the Legislative Analyst concluded that section 3003.5 is a misdemeanor. In any event, "[t]he Legislative Analyst's comments, like other materials presented to the voters, 'may be helpful but are not conclusive in

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[16] CDCR was compelled to establish a policy to enforce the residency restriction, since section 3003.5 does not state that failure to adhere to it is a public offense, and no penalty is prescribed by the statute. See CDCR Policy No. 07-36, Implementation of Jessica's Law (Aug. 17, 2007); see Cal. Code Regs., Tit. 15, § 2616, subd. (a)(15); *E.J., supra*, 47 Cal.4th at p. 1266.

[17] Health and Safety Code section 11372.5, subdivision (a), refers to violation of Health and Safety Code section 11364 as a "conviction." In light of this language, it is clear that violation of Health and Safety Code section 11364 is a crime which can result in conviction.

determining the probable meaning of initiative language.' [Citation.]" (*San Francisco Taxpayers Assn. v. Bd. of Supervisors* (1992) 2 Cal.4th 571, 580.)

Appellant contends that the plain language of section 3003.5(b) supports his position. The plain language of that section, however, does not state that violation of the residency restriction is a public offense. Nor does it state that any punishment attaches to it.

Further, a reviewing court must refer to the entire initiative to determine its purpose and intent, even when there is no ambiguity in the statutory provisions. (*Professional Engineers in California Government v. Kempton, supra*, 40 Cal.4th at p.1039.) "'The [initiative's] language must ... be construed in the context of the statute as a whole and the [initiative's] overall ... scheme." (*Id.* at p.1037.) When viewed as a whole and in the context of the overall scheme, section (b) of section 3003.5 should be construed as applying only to parolees. Pre-existing subdivision (a) of section 3003.5, restricting registered sex offenders from living together during parole supervision, is enforceable only by parole revocation, as is the narrow residency restriction relating to certain child molesters on parole in section 3003(g).

Also, since the intended scope and application of the residency restriction is unclear, it should be construed consistently with the public safety goal intended by the initiative and carried out through the state's comprehensive approach to sex offender management. Voter intent was clearly to prevent sexual recidivism. The construction urged by respondent is far more likely to effectuate that intent. "Whether enacted directly by the People or by the Legislature, a statute should not be construed so as to render its provisions ineffective or contrary to a stated legislative objective." (*People v. Craft* (1986) 41 Cal.3d 554, 559-560; *People v. Pieters* (1991) 52 Cal.3d 894.) Since parole began to enforce the residency

restriction in 2007, the transient registrant population has tripled and now comprises close to 10% of registered sex offenders living in California communities.[18] If the residency restriction is construed to apply to all registered sex offenders released from custody after enactment of the initiative, and if enforceable as a misdemeanor, it is more than likely that transient sex offenders will soon outnumber those with homes. Or, as happened in Iowa, sex offenders will simply fail to register.[19]

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[18] *Homelessness among Registered Sex Offenders in California: The Numbers, the Risks and the Response* (Nov. 2008) California Sex Offender Management Board; *Homelessness Among California's Registered Sex Offenders: An Update*, California Sex Offender Management Board (Aug. 2011); both reports found at <www.casomb.org/reports>.

[19] California Sex Offender Management Board Recommendations Report (Jan. 2010), at p. 45, fn. 46, found at <www.casomb.org/reports>.

CONCLUSION

The judgment of the Court of Appeal should be reversed.

Dated: November 8, 2011

Respectfully submitted,

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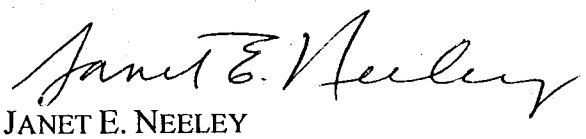

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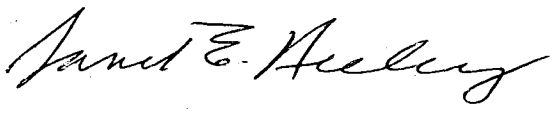
CERTIFICATE OF COMPLIANCE

I certify that the attached **APPELLANT'S REPLY BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 7,447 words.

Dated: November 8, 2011

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Mosley**
No.: **S187965**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On November 8, 2011, I served the attached **APPELLANT'S REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 8, 2011, at Sacramento, California.

_____
Signature

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